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In The

Supreme Court of the United States

October Term, 1995

ANTHONY TORCASIO,

Petitioner,

v.

EDWARD W. MURRAY, DIRECTOR; G. L. BASS, DEPUTY WARDEN; RUFUS FLEMING; DAVID L. ROBINSON; R. J. BECK; AND G. P. DODSON,

Respondents.

On Certiorari Review From The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The United States Court of Appeals for the Fourth Circuit properly determined that the doctrine of qualified immunity protects the respondents, Officials of the Virginia Department of Corrections ("VDOC"), from any monetary damages that might flow from petitioner Anthony Torcasio's 42 U.S.C. § 1983 lawsuit. Torcasio, who claims that his obesity rendered him a "handicapped person" or a "qualified individual with a disability" entitled to the protection of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, is dissatisfied with the extent of the accommodations made for his morbidly obese condition. He concedes, however, that his release from the VDOC moots his claim for injunctive relief; since qualified immunity bars his claim for a monetary judgment, his lawsuit has been properly dismissed.

OPINION BELOW

The opinion of the United States Court of Appeals dated June 29, 1995, affirming the judgment of the district court to the extent that it found the respondents entitled to qualified immunity and reversing to the extent that it did not, is reported as *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995). The decision of the United States District Court for the Eastern District of Virginia, Richmond Division, dated September 14, 1994, is reported under the same style at 862 F. Supp. 1482 (E.D. Va. 1994).

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The respondents are officials of the VDOC. The petitioner, Torcasio, was an inmate who filed successive *pro se* Complaints. His first Complaint challenged certain conditions of confinement at the Greensville Correctional Center. The district court *sua sponte* invoked the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* (App. 2-3). The district court questioned whether the Rehabilitation Act even applied to prisoners, and on May 20, 1993, dismissed the case as moot because Torcasio had been transferred out of the Greensville facility.

Torcasio appealed *pro se*. The court of appeals, establishing the law of the case, found that the matters about which Torcasio complained were mere "inconveniences."[1]

The court of appeals further found that Torcasio's only allegation of injury resulted from a slip, allegedly caused by a lack of anti-slip abrasives around an ice machine. Since Torcasio had suffered no significant injury, and produced no evidence of any harm, the court found no constitutional violation. The court further noted, however, that Torcasio was complaining on appeal that the same matters he had sued about at the Greensville facility also existed at his new prison, the Keen Mountain Correctional Center. The court accordingly found the mootness doctrine inapplicable and remanded the "potential" statutory claims.

Meanwhile Torcasio, still proceeding *pro se*, had filed a 185-page Complaint and Amended Complaint (including "attachments") in another district court. He raised primarily the same allegations as before, only this time

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[1] *Torcasio v. Murray*, No. 93-6585 (4th Cir. Nov. 15, 1993).

with respect to his new prison, Keen Mountain. He additionally complained about an interim 30-day infirmary stay in the Nottoway Correctional Center. This second case was transferred and then consolidated with the remanded first case. All defendants joined in a summary judgment motion, which motion incorporated by reference the original summary judgment motion. Torcasio responded, and the trial court issued its opinion and order in *Torcasio v. Murray*, 862 F. Supp. 1482 (1994), which was the subject of the appeal underlying *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995). The lower court outlined Torcasio's claims as follows:

A. (1) The showers at Keen Mountain are raised 17 inches from the floor of the bathroom. There is an 8 inch step leading from the bathroom floor to the shower stall.

(2) The handrail outside of the stall is too small and improperly located to be of any real assistance to plaintiff.

(3) There is no other assistance to help plaintiff enter and exit the stall.

(4) The entrance to the shower stall is only 23 1/2 inches wide.

(5) The above deficiencies subject plaintiff to cuts, abrasions, ridicule, and fear of falling whenever using the shower facilities.

B. (1) There are no handrails in plaintiff's cell to assist him in the use of his toilet.

(2) The failure to provide handrails for plaintiff's toilet has made it difficult for him to use his bathroom. Due to his great weight, Mr. Torcasio's genitals are often submerged in the toilet bowl.

C. (1) The pod tables do not accommodate someone of plaintiff's girth.

(2) The table cuts and bruises plaintiff if he attempts to sit at the pod table facing in.

D. (1) The cell doors are 12 1/2 inches wide, accordingly plaintiff is forced to enter the cell sideways.

(2) Torcasio is subject to ridicule and in some instances physical pain from his entry and exit from the cell.

E. (1) The recreation yard is too far from Torcasio's cell.

(2) The prison does not offer alternative outdoor recreational activities for someone, like Torcasio, who cannot walk or stand for long periods of time.

(3) There are no suitable chairs for someone of plaintiff's girth in the outdoor recreation yard.

F. (1) The steel tables in the recreation area do not accommodate a person of Torcasio's girth.

(2) Torcasio's girth prevents him from playing the indoor recreational activities provided by the prison, i.e., weightlifting, pool, ping-pong and foosball.

G. (1) The lobby area is sometimes wet and slippery. The prison needs to place non-skid matting down in the lobby. Plaintiff's girth makes him more susceptible to slipping and injuring himself severely.

H. (1) The tables and chairs in the dining hall are inadequate to accommodate a person of Torcasio's girth.

(2) Torcasio is forced to stand in line for long periods of time waiting for his food.

(3) Torcasio's girth subjects him to additional verbal abuse from inmates and correctional officers while maneuvering through the narrow food lines.

(4) The floor in the dining hall can become wet and slippery, especially in front of the tray

window. The prison needs to place non-skid matting down in potentially hazardous areas throughout the dining hall.

I. There are no vehicles at Keen Mountain for transporting the disabled. Torcasio is forced to step on milk crates in order to enter or exit the vehicles at the prison.

J. (1) The prison refuses to provide aid to Torcasio in his daily life functions such as dressing, personal hygiene, and cell maintenance.

(2) At night the prison does not provide plaintiff with an adequate means of signaling the staff in case of a medical emergency. There is a call button in plaintiff's cell, however the guards do not respond in a timely fashion, when they respond at all.

K. There is no seating offered at the commissary window or pill line.

L. (1) Torcasio's housing unit is located over one hundred yards away from every other support facility, i.e., gym, law library, etc.

(2) Torcasio's weight makes it difficult for him to make the frequent trips to the support facilities.

M. (1) Torcasio's cell is too small to accommodate him and his larger than regulation bed.

(2) Torcasio asserts that he is unable to effectively use the sink in his cell because of his back.

N. Torcasio complains about Nottoway as follows:

(1) The lights in the Infirmary were left on 24 hours a day causing him headaches.

(2) There were no handrails in the showers and toilet.

(3) Torcasio was denied the same privileges as members of the general population.

(4) Plaintiff was verbally abused by correctional officers.

(5) There was no handicapped transportation available at Nottoway. Plaintiff had to step on a milk crate in order to enter and exit the prison van. There were no seat belts in the prison van.

The district court granted the respondents' motion for summary judgment on Claims A, F2, L in part (location of Torcasio's housing unit), M (cell size and furniture), and N2 (hand rails in the shower area). However, the court denied the respondents' motion for judgment as a matter of law on the basis of qualified immunity as to Claims B, C, D, F1, L in part (travel time between different facilities), N4 (verbal abuse by corrections officers), G, H, I, J, and K, and referred the case to a Magistrate Judge to conduct a hearing.

The defendants immediately appealed, claiming that the district court had erred as a matter of law in finding that the damages claim survived their plea of qualified immunity. The court of appeals considered the question whether the district court erred when it partially denied qualified immunity to the respondents in a suit by a morbidly obese inmate under section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), and Title II of the Americans With Disabilities Act ("ADA"). The court initially determined that the respondents were entitled to qualified immunity for two reasons:

> First, it was not clearly established at that time that the ADA and Rehabilitation Act – the two acts upon which Torcasio's claim of a right to modification of services and facilities is predicated – applied to state prisons. Second, even if it were clear that Torcasio, as a prisoner in a state facility, was protected by the Rehabilitation Act and the ADA, it was not clearly established

> that, as a "morbidly obese" individual, he qualified as an "individual with a disability" protected under either act.

Torcasio, supra, 57 F.3d at 1343-44.

The Fourth Circuit then found, as a third alternative basis validating the defendants' protection from a money damages award, that the prison officials could, as a matter of law, reasonably have thought they acted lawfully.

> Finally, even if we were to assume, notwithstanding the above objections, that "a morbidly obese inmate's right to the modification of specific [prison] services and facilities" was clearly established, we would still find the VDOC officials entitled to qualified immunity as to all of Torcasio's claims, because we find that "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

57 F.3d at 1355.

Contrary to Torcasio's assertions, the question of the applicability of the Rehabilitation Act and the ADA to state prisons was not decided by the court below.

SUMMARY OF ARGUMENT

The sole issue in this case is whether the Virginia prison officials that Torcasio sues are entitled to qualified immunity from his claim for damages from them. In order to avoid the result that the Fourth Circuit reached, Torcasio must demonstrate that the ADA and/or the Rehabilitation Act clearly required these officials to provide him the various amenities of prison life that he claimed in his lawsuit.

Justice Powell, sitting by designation on the Fourth Circuit, has succinctly summarized the state of the law relative to qualified immunity:

> Government officials performing discretionary functions are shielded from civil liability to the extent their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects all such officials unless the law clearly prohibited the action taken. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).
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> * * *
>
> For the purpose of determining whether a defendant is entitled to qualified immunity the plaintiff's rights must be clearly established under the particular circumstances confronting the official at the time of the questioned action. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The right of the plaintiff must be established so clearly that a reasonable official would know what he is doing violates that right. *Ibid.* Where there is a legitimate question as to whether the officer's conduct would objectively violate the plaintiff's right, qualified immunity "gives police officers the necessary latitude to pursue their [duties] without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law." *Tarantino v. Baker*, 825 F.2d 772 (4th Cir. 1987).

Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991).

Continuing with his analysis of the law of qualified immunity, Justice Powell succinctly explains the distinction between the law relative to the merits of the case, and the law relative to qualified immunity:

> That issue reaches the merits of the case, but qualified immunity affords government officials greater protection than a simple defense on the merits. *See Mitchell*, 472 U.S. at 526. Furthermore, the purpose of qualified immunity is to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury. *Ibid.* A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information *could* have believed that his conduct was lawful. *Anderson*, 483 U.S. at 641.

Slattery v. Rizzo, supra, 939 F.2d at 216.

The Fourth Circuit's analysis of the good faith issue contains three prongs: (1) The law was not clearly established that either the ADA or the Rehabilitation Act clearly applied to the internal operations of state prisons; (2) the law was not clearly established that an obese person such as Torcasio would be entitled to invoke the protections of either Act; and (3) in any event, the law certainly was not clearly established that the many accommodations prison officials made for Torcasio would be inadequate to satisfy the requirements of either Act. A favorable determination relative to any one of the three areas of analysis necessarily results in a determination that the defendants are entitled to good faith immunity.

The Fourth Circuit has described many of the accommodations made for Torcasio, including the provision of a private cell intended to house two inmates; the removal of the bed from his cell and installation of a full-sized hospital bed equipped with railings; the provision of reinforced chairs for him to use in his cell and in the dining hall; the installation of mats and handrails in the shower area; the placement of a step to ease his shower ingress and egress; placement of a handrail in the shower;

the placement of a free-standing locker in his cell as opposed to a footlocker; and the utilization of a device designed to assist his breathing while he slept. Certainly it is beyond question that no law clearly required these officials to do more for Torcasio. The fact that legal scholars can later debate whether either Act might have required more does not mean that these officials are subject to a monetary damages award simply because they failed to contemplate every conceivable ramification of two federal laws, neither of which clearly was ever intended to impact the operations of a state prison. The Fourth Circuit's analysis is a sound one; it is in accordance with every existing good faith immunity principle that this Court has ever articulated; and it is not in conflict with any other good faith immunity case out of any of the federal circuits.

REASONS FOR DENYING THE WRIT

I. THE DECISION RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *TORCASIO V. MURRAY*, 57 F.3D 1340 (1995), DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE STANDARDS APPLICABLE TO THE PROPER DETERMINATION OF THE RESPONDENTS' ENTITLEMENT TO QUALIFIED IMMUNITY.

The sole question squarely addressed by the court below was whether the respondents were entitled to the defense of qualified immunity. The court below employed no novel standard and created no "conflicts" of authority in its analysis of the respondents' entitlement to the defense of qualified immunity. Rather, the decision applies black letter qualified immunity law.

1. THE COURT BELOW APPLIED CLEARLY ESTABLISHED QUALIFIED IMMUNITY ANALYSIS

The court of appeals commenced its qualified immunity analysis with its own decision in *Dimeglio v. Haines*, 45 F.3d 790, 794 (4th Cir. 1995), *quoting Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The court stated the elementary principle that "[g]overnment officials are protected by qualified immunity 'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' " *Torcasio, supra*, 57 F.3d at 1343. Following this Court's precedent of *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), as applied in *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990), the court noted that "[i]n analyzing a claim of qualified immunity it is . . . necessary first to identify the specific right allegedly violated, then to inquire whether at the time of the alleged violation it was clearly established, then further to inquire whether a reasonable person in the official's position would have known that his conduct would violate that right." *Collinson v. Gott, supra*, 895 F.2d at 998.

This Court only recently reaffirmed that this analysis is apt to "the purely legal issue what law was 'clearly established' " in *Johnson v. Jones*, ___ U.S. ___, ___, 115 S.Ct. 2151, 2155-56, 132 L.Ed.2d 238, 247 (1995):[2]

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[2] The decision in *Johnson* raises the specter of whether the district court's judgment denying qualified immunity was immediately appealable. Torcasio does not reference the question in his Petition, and with good reason. Each of the three prongs of the Fourth Circuit's analysis fits squarely within the *Mitchell* rule of immediate appealability. The facts material to the qualified immunity analysis are not in dispute. Torcasio doesn't question that prison officials did many things to accommodate his physical condition, *see* 57 F.3d at 1356; however, he

> [I]n *Mitchell v. Forsyth*, [*supra*], 472 U.S. 511, this Court held that a district court's order

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complains that they did not go "far enough." *See, e.g.*, Petition at p. 7. The qualified immunity analysis presumes that there are "things" that Torcasio wanted, but didn't get. The relevant question is whether these defendants violated a clear legal right Torcasio had to each of the many "things" the district court identified him as wanting. *See* Brief in Opposition, *supra* at p. 6.

The distinction between disputed facts that may be material to the ultimate question of liability and the existence of undisputed facts that control the qualified immunity analysis is inherent in the *Johnson* decision, and has already been recognized by numerous courts of appeal. *E.g. Stella v. Kelley*, 63 F.3d 71 (1st Cir. 1995) (*Johnson* "permits immediate review of the rejection of a qualified immunity claim when the issue appealed concerns not what facts the litigants might (or might not) be able to prove, but, rather, whether a given set of facts shows a violation of a federally protected right, [thus permitting] immediate review of a trial court's order in this respect"); *Rivera v. Senkowski*, 62 F.3d 80 (2nd Cir. 1995) (*Johnson* permits immediate review of Appellants' immunity defense to the extent it could be decided as a matter of law, based on the undisputed facts and in isolation from the remaining issues of the case); *Rodriguez v. Phillips*, 66 F.3d 470 (2nd Cir. 1995) ("Johnson" does not disturb the rule that whether a disputed fact is material is a question of law and therefore, in the qualified immunity context, a finding of materiality is subject to prompt *de novo* review"); *Christophel v. Kukulinsky*, 61 F.3d 479 (6th Cir. 1995) (a district court's denial of summary judgment which is premised in part on the existence of fact issues, is immediately appealable where the factual dispute does not affect the defendants' right to qualified immunity); *Rambo v. Daley*, ___ F.3d ___, 1995 U.S. App. Lexis 30906, No. 94-3441 (7th Cir., Oct. 27, 1995) ("[O]ne large 'exception' [to *Johnson*] allows public officials asserting a defense of qualified immunity to appeal the denial of summary judgment where the issue on appeal is limited to 'whether or not certain given facts show [ ] a violation of clearly established law' "); *Reece v. Groose*, 60 F.3d 487 (8th Cir., July 20, 1995) (in recognizing that the issue of qualified immunity is itself fact intensive, the Eighth Circuit

> denying a defendant's motion for summary judgment was an immediately appealable "collateral order" (*i.e.*, a "final decision") under *Cohen [v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)], where (1) the defendant was a public official asserting a defense of "qualified immunity," and (2) the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of "clearly established" law. *Id.*, at 528 . . . ; *see Harlow v. Fitzgerald*, [*supra*] 457 U.S. 800, 818 . . . (holding that public officials are entitled to a "qualified immunity" from "liability for civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known"). Applying *Cohen*'s criteria, the *Mitchell* Court held that this kind of summary judgment was, in a sense, "effectively unreviewable," for review after trial would come too late to vindicate one important purpose of "qualified immunity" – namely, protecting public officials, not simply from liability, but

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held that *Johnson* does not prevent interlocutory appeal of the trial court's denial of qualified immunity in order to determine whether a reasonable official could have believed, in light of the facts known at the time, that her actions did not violate plaintiff's constitutional rights); *Babb v. Lake City Community College*, 1995 U.S. App. Lexis 2789, No. 94-2841 (11th Cir., Oct. 5, 1995) (*Johnson* permits an interlocutory appeal from the district court's denial of qualified immunity where the issue on appeal is whether the undisputed facts show a violation of clearly established law).

It also should be noted that the Fourth Circuit handed down its decision in *Torcasio* over two weeks after this Court decided *Johnson*. The Fourth Circuit obviously was aware of *Johnson* when it decided *Torcasio*.

> also from standing trial. *Mitchell, supra,* at 525-527 . . . For related reasons, the Court found that the order was conclusive, *i.e.,* it "conclusively" settled the question of the defendant's immunity from suit. 427 U.S. at 427. . . .

Torcasio's misapprehension of the qualified immunity defense involves what this Court in *Johnson* characterized as the " 'separability' question," that is, "whether or not the 'qualified immunity' issue was 'completely separate from the merits of the action.*' ", ___ U.S. at ___, 115 S.Ct. at 2156, 132 L.Ed.2d at 246 (*citation omitted). Thus, his argument is fatally flawed in its insistence that the court below was first constrained to address the substance of his claims under the Rehabilitation Act and the ADA *before* addressing the question of the respondents' entitlement to qualified immunity. As the *Mitchell* Court held and the *Johnson* Court reiterated, "the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct" is conceptually distinct from address of "the merits of the plaintiff's claim that his rights have been violated.*" *Johnson v. Jones,* ___ U.S. at ___, 115 S.Ct. at 2156, 132 L.Ed.2d at 246 (*citation omitted).

The magnitude of the analytical error in Torcasio's topsy-turvy analysis of the judgment of the court below may thus be readily discerned. His argument that the Fourth Circuit should first have addressed the merits of his Rehabilitation Act and ADA claims, by conducting an "individualized inquiry" about the nature and extent of Torcasio's alleged disabilities,[3] *before* addressing the legal question "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions," conflates the questions which this

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[3] *See* Petition at p. 24.

Court has repeatedly ruled must be analyzed separately and in the appropriate order. Torcasio's basic incomprehension of the appropriate ordination of the elements of the qualified immunity analysis is repeated throughout his Petition.[4]

2. EXISTING LAW DID NOT CLEARLY ESTABLISH TORCASIO'S ENTITLEMENT TO FURTHER ACCOMMODATIONS OF HIS PHYSICAL OBESITY

A. TORCASIO'S *POST HOC* PARSING OF ARCANE NUANCES OF REGULATORY PROVISIONS CANNOT MAKE THE LAW CLEARLY ESTABLISHED

Torcasio makes much ado about federal regulations promulgated pursuant to the Rehabilitation Act by various federal agencies and boards, in an effort to demonstrate the "clear application" of the Act to state inmates.[5] In support of this portion of his argument, Torcasio cites

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[4] *See, e.g.*, Petition at pp. 5, 9, 10, 15-16 (contending that the decision of the court below is "inextricably tied to the substance of the Acts"), and 22 through 25.

See also, Sup. Ct. R. 15. Torcasio's Petition includes a number of misstatements which the respondents are constrained by this Court's Rule 15 to note, as follows:

Petition at pp. 3, 9, 13, 14, and 15 states that the Court below essentially ruled that the Rehabilitation Act and the ADA do not apply to state prisons. This is not correct. *Cf. Torcasio*, 57 F.3d at 1352.

Petition at p. 4 states that Congress "guaranteed" the protections of the Rehabilitation Act and the ADA to "all disabled state prisoners." This is not correct. One searches both acts in vain for any reference whatsoever to state prisoners, as the *Torcasio* Court noted, 57 F.3d at 1345-46.

[5] *See* Petition at pp. 18-20.

(1) a September 22, 1995 letter addressed to the petitioner's counsel from the Department of Justice which refers him, *inter alia*, to 28 C.F.R. § 42.540(h); (2) a "general rule of statutory construction that courts should exercise deference with regard to administrative interpretations"; (3) 28 C.F.R. § 42.540(h) and (j); (4) a 1980 regulatory preamble reported at 45 Fed. Reg. 37620, 37630 (1980); and (5) 28 C.F.R. § 39.170(d)(ii), which requires a *federal* inmate to exhaust *federal* Bureau of Prisons administrative remedies prior to *filing* a Rehabilitation Act Complaint.

Torcasio's reliance on the cited authority shows, again, his basic misapprehension of the qualified immunity analysis. A September 1995 letter, solicited by and addressed to the petitioner's counsel in contemplation of filing the petition instantly opposed, cannot by any flight even of Torcasio's generous fancy be construed as "clearly establishing" for these respondents *prior to the commencement of Torcasio's action in the district court* either the law which they allegedly violated or Torcasio's specific right as an obese individual to invoke that law.[6]

Torcasio's reliance on a 1980 regulatory preamble is also inapt. Assuming, *arguendo*, the "reasonableness" of requiring the respondent Virginia prison administrators to be adept in the esoterica of the Federal Register, such fabulous knowledge would neither warn them of their

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[6] Neither the federal regulations cited in the September 1995 letter nor the 1980 regulatory preamble were cited by Torcasio in his Fourth Circuit brief below, a brief prepared by his counsel in this Court. Certainly, a rule of law which relies for its validity on such arcane parsing of the Federal Register as that proffered by Torcasio, for the first time since the commencement of these proceedings, in his Petition at pp. 17-20, cannot reasonably be considered "clearly established" for these respondent state prison administrators.

potential liability to Torcasio for money damages nor advise them that their many attempts to accommodate Torcasio's ever-expanding list of grievances would be inadequate to avoid that liability. In the cited preamble, the Attorney General described section 504 as prohibiting *employment* discrimination by recipients of federal financial assistance. 45 Fed. Reg. 37620, 37628 (June 3, 1980); *accord, Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).[7] Torcasio never alleged that he was either a VDOC

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[7] In *Darrone*, this Court held that a private damages action for *employment discrimination* against the handicapped can be maintained against an *employer* receiving federal financial assistance. The Court in *Darrone* expressly refused to decide the extent of money damages available under section 504. 465 U.S. at 630. Nor did the *Darrone* court expressly define "program or activity." Nevertheless, the legislative history, executive interpretation, and the Rehabilitation Act's originating purpose were to promote and expand employment opportunities for the handicapped. *See, e.g.*, S. Rep. No. 93-318, 93d Cong., 1st Sess. 18-19, 70 (1973); S. Rep. No. 93-319, 93d Cong., 1st Sess. 2, 8 (1973); H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 16, 18, 23-29, 34, 38, 42-43 (1978); S. Rep. No. 95-890, 95th Cong., 2d Sess. 8, 13, 20-21, 27, 36 (1978); H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978). Subsequent amendments of the Act were required to extend its proscriptions to federal contractors and education programs receiving federal funds.

At the time that *Darrone* was decided, the courts were divided on the question whether an institutional or "specific program" approach was implied by the Rehabilitation Act's jurisdictional predicate of receipt of federal funding by the target "program and activity." *Cf. Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981) (Section 504 applied to program even though it did not directly receive financial funds although other entities of university did) *with Gallagher v. Pontiac School Dist.*, 807 F.2d 75, 80 (6th Cir. 1986) (program-specific limitations of §§ 901, 902 of Title IX apply by analogy).

This Court found a private cause of action, again for *employment* discrimination, in all federally funded education

employee[8] or that the VDOC was a recipient of federal financial assistance. The receipt of federal funds is a jurisdictional predicate of a Rehabilitation Act claim. *See, e.g., U.S. Dept. of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 604 (1986) (section 504 action requires identification of the recipient of federal assistance).

In light of the relevant case law, the "conflict" which Torcasio posits between the lower court's *dicta* and federal regulations promulgated under the Rehabilitation Act may be seen merely as the product of his wishful thinking. Torcasio's idiosyncratic interpretation of the regulations does not create a predicate for *certiorari* review within 28 U.S.C. § 1254(1); Sup. Ct. R. 10.

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programs, *analogous to* – not identical to or predicated upon – section 504, in Title IX. *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

[8] In his Petition for Certiorari, Torcasio concedes that the absence of an employment relationship was fatal to the claims of the federal inmate in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991). Petition, p. 12 at n. 6. The contortions through which Torcasio must go to argue that *Williams* is really an employment law case, and not decided strictly on the basis of the plaintiff's status as an inmate, simply reinforces the absence of clearly compelling legal precedent. The Fourth Circuit clearly has much the better of the argument, both on the import of *Williams*, and its meaning for qualified immunity. *Torcasio, supra*, 57 F.3d at 1350. And we would be remiss not to point out that the district court's first opinion in this very proceeding also construed *Williams* as finding the Rehabilitation Act inapplicable to prisons. ("One court has held that § 794 does not apply to prison facilities because a prison is not a 'program or activity' covered by the section.")

B. THE REFERENCED REGULATIONS CANNOT COMPENSATE FOR THE ABSENCE OF CLEAR CONGRESSIONAL INTENT

There is no way to avoid Torcasio's obvious intent to have this Court rule that the ADA and Rehabilitation Act apply to state prisons in each and every facet of prison life. That strikes us as an odd utilization of this Court's *certiorari* jurisdiction in what is, at its bottom line, a relatively straightforward qualified immunity case. Nonetheless, because of his insistence, we feel compelled to address the matter, at least briefly.

Even apart from a qualified immunity analysis, Torcasio's argument from "general rules of statutory construction" ignores a specific constitutional constraint imposed by our system of federalism. Although pre-emption may result from "a federal agency acting within the scope of its congressionally delegated authority,*" *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 371 (1986) (*citation omitted), as this Court observed, "[t]he critical question in any pre-emption analysis is always whether Congress *intended* that federal regulation supersede state law.*" *Id.* (*Citation omitted.) (Emphasis supplied.) Deferral to the agency's interpretation of the Rehabilitation Act is particularly inappropriate under the very rule of construction asserted by Torcasio, since the authority of the Department of Justice to promulgate regulations pursuant to that act comes not from Congress but from the Executive Branch. Executive Order 12250 (1980).[9] Like his argument predicated on a 1980 regulatory preamble, Torcasio's argument predicated on "general rules of statutory construction" ignores the "reasonableness" element of the qualified immunity

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[9] By way of contrast, Congress has charged the Department of Justice to issue regulations implementing Title II of the ADA. *Torcasio, supra*, 57 F.3d at 135-52, *citing* 42 U.S.C. § 12134.

analysis. Intoning "general rules of statutory construction" is a woefully inadequate way to show (1) that either the ADA or the Rehabilitation Act "clearly" applies to state prisoners; (2) that an obese inmate "clearly" is covered under either act; or (3) that existing law "clearly" established Torcasio's entitlement to those "things" he says prison officials did not do for him.

As the *Torcasio* court noted, "[i]t cannot be disputed that the management of state prisons is a core state function." 57 F.3d at 1345. Quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973), the Fourth Circuit noted that "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." 57 F.3d at 1345. Thus, Congressional intent to apply either act to state prisons is the starting point for analysis.

The first place to look for expressions of *Congressional* intent is the statute itself. *U.S. Dept. of Transportation v. Paralyzed Veterans of America, supra*, 477 U.S. at 604. The court below concluded:

> Given the significant implications of application of the ADA and Rehabilitation Act for the management of state prisons, and therefore for federal-state relations, we simply cannot agree with Torcasio's assertion that the broad, nonspecific language contained in the isolated portions of the acts upon which he focuses "clearly establishes" that state prisons are within the acts' coverage. Because the management of state prisons implicates "decision[s] of the most fundamental sort for a sovereign entity,"* Congress must speak unequivocally before we will conclude that it has "clearly" subjected state prisons to its enactments.

57 F.3d at 1346 (*citation omitted). As this Court noted with approval in *Kelly v. Robinson*, 479 U.S. 36 (1986):

> Justice Frankfurter advocated a similar approach to the interpretation of regulatory statutes that infringe upon important state interests: "The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation . . . justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit."

479 U.S. at 51 n. 11, *quoting* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-540 (1947). Nothing in the regulatory authorities on which Torcasio relies shows a clear Congressional intent radically to readjust a state's authority to manage state prisons, which readjustment adoption of Torcasio's interpretation of the acts at issue would effect.

C. NO EXISTING CASE AUTHORITY CLEARLY ESTABLISHES THE APPLICATION OF THE ADA OR THE REHABILITATION ACT TO STATE PRISONS, SO AS TO CHANGE THE QUALIFIED IMMUNITY ANALYSIS

The obvious lack of a clear Congressional intent brings us right back to what this case is all about – qualified immunity: what must prison officials have

known the law required, and when must they have known it. As the court below so clearly noted, no controlling authority compels the conclusion Torcasio seeks.

Torcasio concedes that the court of appeals for the Fourth Circuit is the only court of appeals to have addressed "the specific issue of the ADA's coverage of state prisoners."[10] Only two federal circuit courts of appeal have faced state inmate claims against state prisons arising under section 504 of the Rehabilitation Act, the Ninth Circuit in *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) and *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), and the Eleventh Circuit in *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). None of the three cases had anything to do with the issue of qualified immunity for prison officials who must wrestle with attempting to discern what particular measures might be thought necessary to implement the Act in a state prison, even assuming the Act applies. Moreover, as the Fourth Circuit found, none of the cases make it "clear" to a Virginia prison official that the Act requires anything of him or her.

The question of the inmates' standing under section 504 was not even squarely before the court in *Harris v. Thigpen*, since the Alabama Department of Corrections defending that underlying action conceded the applicability of section 504 to inmate lawsuits. The instant respondents do not so concede.

As the court in *Harris v. Thigpen*, 941 F.2d at 1522 n.41 observed, the court in *Bonner v. Lewis*, 857 F.2d at 562, did not definitively rule on the standing question, but merely "suggest[ed] that prisoner claims are *potentially* cognizable" under the cited section. In both cases the courts first

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[10] Petition at p. 14. As noted above, that address is in the form of *dicta*, and was not a basis for the lower Court's finding that the respondents were entitled to qualified immunity.

found that the inmate claimants had either actual handicapping conditions (deafness in *Bonner*) or perceived handicapping conditions (seropositivity for the HIV in *Harris*). The court in *Harris* found that the perceived handicapping condition had been the basis of a regulation imposing "blanket, differential treatment of seropositive inmates with regard to available activities and programs" based solely on the fact of seropositivity without regard to the infected inmates' actual expression of symptoms. 941 F.2d at 1524. The inmate in *Bonner* had an independent right under Arizona law to the specific assistive service, that is, a sign language interpreter, which he requested in that case. 857 F.2d at 564.

Nor did the court in *Gates v. Rowland* face a standing challenge to section 504. Rather, that court was asked to interpret a consent decree under which California prison officials had agreed to provide more than the legally required minimum remedies to California state inmates whose handicapping condition of HIV-seropositivity was not challenged by those prison officials. Like the Alabama inmates in *Harris v. Thigpen*, the California inmates in *Gates v. Rowland* were aggrieved by a blanket prison policy which segregated them from other inmates and denied them access to jobs and programs open to other inmates who were not seropositive. And, like the Alabama defendants, the California Department of Corrections had conceded – in the latter case, within the terms of the consent decree – "that rights established by section 504 of the Rehabilitation Act of 1973 were implicated." 39 F.3d at 1445. The instant respondents do not so agree.

Review of the relevant universe of three federal courts of appeal decisions shows that in the twenty-two year history of the Rehabilitation Act, *no* federal circuit court has squarely faced the challenge to an inmates' standing under section 504 presented to the court below. The question of whether Torcasio had any rights under the cited section is a far cry from "clearly established."

D. NO CASE AUTHORITY CLEARLY ESTABLISHES THE APPLICATION OF THE ADA OR THE REHABILITATION ACT TO OBESE PERSONS, SO AS TO CHANGE THE QUALIFIED IMMUNITY ANALYSIS

Not only is application of the Act in the first instance not clearly established, but the contours of the Act's application to obese persons is unclear. Obesity *per se* is not a disability as defined by the Rehabilitation Act or the ADA. As far as appellants can determine, no federal court to consider the question has ruled that obesity itself is a disability. Only one state court to consider the question has ruled in favor of the claimant, and in that court, an intermediate appellate court in New York State, the decision was based on a 1974 New York State statute prohibiting employment discrimination, and was constrained by the court's limited right of review of an agency decision under New York State law. All the cases, both state and federal, considering the question of obesity as the basis of a handicap discrimination claim, have done so in the larger context of claims of employment discrimination. Even assuming *arguendo* that Torcasio may assert his obesity as the basis of his disability discrimination claim, he has not cited a single case that even remotely supports his contention that the right he asserts is sufficiently clearly defined to put these respondents on notice of its existence, let alone of its contours.

Of the five cases upon which Torcasio relied below to buttress his argument of a clearly established right, three were decided against the obese claimants, one was decided in favor of the obese claimant but on an obscure provision of New York state law, and only one includes any reference to or discussion of the federal standard

governing a federal disability discrimination claim.[11] Torcasio has not and cannot submit any law or facts

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[11] In his brief below, Torcasio relied on a mere five cases – three of which are state court decisions, including intermediate state court decisions, grounded in state law – to support his argument that the relevant federal statutory definition "clearly establishes" obesity as a disability. Those five cases are *Cook v. Rhode Island Dep't of Mental Health*, 10 F.3d 17 (1st Cir. 1993); *Smaw v. Virginia Dep't of State Police*, 862 F. Supp. 1469, 1474 (E.D. Va. 1994); *Krein v. Marian Manor Nursing Home*, 415 N.W. 2d 793 (N.D. 1987); *State Div. of Human Rights v. Xerox Corp.*, 102 A.D. 2d 543, 480 N.E.2d 695, 491 N.Y.S. 2d 106 (App. Div., 4th Dep't, 1984); and *Gimello v. Agency Rent-A-Car Sys.*, 250 N.J. Super. 339, 594 A.2d 264 (App. Div. 1991). All five cases involve claims of disability-based employment discrimination. All five cases are easily distinguished from the case at bar.

In *Cook v. Rhode Island DMH*, the First Circuit Court of Appeals ruled in favor of a non-disabled morbidly obese section 504 claimant whose obesity had been the basis of discrimination in hiring by the defending employer based on the claimant's *perceived* or *apparent* rather than actual disability. The morbidly obese claimant in *Cook* did not argue that she was disabled thereby.

Smaw v. Virginia DSP involves claims of disability-based discrimination in the employment context, raised under Title I of the ADA rather than section 504 of the Rehabilitation Act. The district court in *Smaw* held that the definition of "disability" within the ADA and the Rehabilitation Act was the same, and proceeded to rule against the obese claimant on both the questions whether obesity was an actual or apparent disability, opining that "specific regulations for the ADA indicate that generally obesity does *not* qualify as a disability." 862 F. Supp. at 1474 (emphasis supplied).

Krein v. Marian Manor Nursing Home is a North Dakota Supreme Court case, dating prior to the enactment of the relevant provisions of the ADA and making absolutely no reference to the Rehabilitation Act, in which the obese claimant alleges discriminatory firing in retaliation for exercise of her rights under the North Dakota workmen's compensation statute and

sufficient to rebut the appellant's entitlement to the defense of qualified good faith immunity.

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based on her "handicapping" condition of obesity. The *Krein* claimant asked that Court to find her obesity a disability entitled to the protection of a North Dakota statute setting forth a state policy against "discriminatory practices" such as "discharge" of an "employee because of physical or mental handicap." The Court ruled against the plaintiff on the "handicap" claim.

The obese claimant in *State Div. of Human Rights v. Xerox Corp.* alleged claims of disability-based discrimination in the defending employer's decision not to hire. The rulings of the intermediate appellate court (one of four in New York State) in that case are based on a 1974 New York state statute as interpreted in 1974 by a state agency to whose decisions the reviewing court was constrained, by other provisions of state law, to grant great deference. Like the North Dakota court, the New York court made absolutely no reference to any provision of federal law. So, although the obese claimant in the New York case won, the substance of her victory leaves Torcasio's obesity-based federal claims utterly unsupported. For reasons analogous to those already articulated concerning the New York and North Dakota cases, the state-statute basis for the decision of the New Jersey intermediate appellate court in *Gimello* provided no guidance to the lower court in deciding the validity of Torcasio's disability claim.

To respondents' knowledge, only one state court case, *Cassita v. Community Foods, Inc.*, 5 Cal. 4th 1050, 856 P.2d 1143, 1993 Cal. LEXIS 4352 (1993), makes specific referrals to the provisions of federal law relevant to Torcasio's claims. Like the five claimants in *Cook, Smaw, Krein, Xerox Corp.* and *Gimello*, the morbidly obese claimant in *Cassita* raised disability-based discrimination claims in the context of discriminatory employment practices.

In *Cassita* the California Supreme Court considered application of the California Fair Employment and Housing Act ("FEHA"), which prohibits employment discrimination on the basis of a person's weight. Like Torcasio, the *Cassita* claimant was morbidly obese. The *Cassita* court reviews the history of FEHA and expressly notes that its definition of a handicap derives from the federal Rehabilitation Act of 1973, 29 U.S.C.

To the extent that a jurisprudence of obesity exists, it is overwhelmingly grounded in state statutes prohibiting

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§ 701 *et seq.*, which definition was subsequently adopted by the ADA. The *Cassita* court observes:

> Although the vast majority of states have enacted statutes prohibiting *employment discrimination* on the basis of disability or handicap . . . there is little uniformity among them and minimal case law interpreting their scope. . . . Only one state, Michigan, has specifically codified a prohibition against *employment discrimination* on the basis of weight. . . . Of the courts that have considered the issue, most have concluded that an individual's weight does not by itself constitute a handicap or disability but may in conjunction with other related disorders . . . under their respective states' antidiscrimination statutes . . .

1993 Cal. LEXIS at 26 n. 11 (emphasis supplied), *citing illustratively Philadelphia Elec. v. Com., Pa. Human Rel.*, 68 Pa. Commw. 212, 448 A.2d 701, 707 (1982) (morbid obesity alone, without other physical consequences, is not a handicap under the Pennsylvania antidiscrimination statute); *Mo. Com'n on Human Rights v. S.W. Bell Tele.*, 699 S.W.2d 75 (Mo. Ct. App. 1985), and *Krein, supra.*

The *Cassita* court also notes that "a widely cited" decision by a federal district court "held that obesity was not a handicap under Washington law because it was not an 'immutable' condition such as blindness or lameness." *Cassita*, 1993 Cal. LEXIS at 26 n. 11, *quoting Greene v. Union Pacific R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981). Having reviewed *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Ca. 1984) (weight lifter with body-builder's bulk caused by voluntary participation in sport of weightlifting has no employment discrimination claim under section 504 for refusal to hire based on weight) and *Cook, supra*, the *Cassita* court opined "[t]hat obesity does not constitute a qualifying disability absent proof of physiological causation under federal law." 1993 Cal. LEXIS at 31:

> In explaining the meaning of disability under the ADA, the federal regulations observe, "It is important to distinguish between conditions that are

discrimination in employment. The courts considering those claims have, for the most part, ruled against the obese claimants. Nothing in this jurisprudence even vaguely supports Torcasio's assertion that the inclusion of obesity within the relevant federal statutory definition of disability is clearly established law. Nor does this jurisprudence of obesity, developed entirely in the context of employment discrimination claims based for the most part on state statutes in states outside of Virginia, put these respondents – Virginia state corrections officials – on notice that the contours of Torcasio's alleged rights as a state inmate allegedly disabled by obesity stretch to cable television service, personal attendants, state-enforced policing of name-calling by other inmates, etc.

In his attempt to create the appearance of a "conflict of authority" among the Circuits on the question whether, at the time of his complaints, the rights of an obese state prison inmate were clearly established, Torcasio once again blurs the conceptual distinction between the threshold legal question of qualified immunity and addressing his claims on the merits. It is beyond cavil that on this record these respondents are entitled to the benefit of the qualified good faith immunity defense.

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impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments." 29 C.F.R. appen. § 1630.2(h) (1992). Examples of the latter include such physical characteristics as "height, weight, or muscle tone" that "are not the result of a physiological disorder."*

Id. at 31-32 (*citation omitted).

II. UPON THE INSTANT RECORD, THE QUESTIONS OF THE APPLICABILITY OF THE REHABILITATION ACT OF 1973 AND THE AMERICANS WITH DISABILITIES ACT TO STATE PRISONERS' CLAIMS AGAINST STATE PRISONS ARE NOT RIPE FOR *CERTIORARI* REVIEW.

Rule 10.1 of the 1990 Supreme Court Rules ("Sup. Ct. R.") provides that this Court's review pursuant to 28 U.S.C. § 1254(1) "is not a matter of right, but of judicial discretion":

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> When a United States court of appeals has rendered a *decision* in conflict with a *decision* of another United States court of appeals *on the same matter* . . . or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Sup. Ct. R. 10 (emphasis supplied). Rule 10 is a prudential rule and as such does not limit the power of this Court to determine which questions it may hear. "A prudential rule, however, is more than a precatory admonition." *Izumi Seimitsu Kogyo v. U.S. Phillips Corp.*, ___ U.S. ___, 114 S.Ct. 425, 427 (1993).

In pertinent part, Rule 10 clearly contemplates that it is a decision squarely made, or an egregious abuse of judicial discretion, which will raise the question ripe for this Court's attention upon *certiorari*. Arguments, such as those proposed by Torcasio, against mere *dicta*, however potentially compelling that *dicta*'s suasive force, are more

appropriate to the rarified atmosphere of a law school debating society than to the rigorous work environment of an Article III Court.

Torcasio is simply wrong in his assertion that the court of appeals based its judgment in favor of respondents on rulings about "the applicability of the Acts to state prisons" and on "the proper inquiry for determining whether a specific individual constitutes a disabled person under the Acts." Torcasio's at best merely artful pleading does not bring the decision of the court below within the scope of Rule 10.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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